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Supreme Court of the United States

OCTOBER TERM, 1948.

Nos. 103, 104.

FRANK LOBAIDO, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

On Petitions for Writs of Certiorari to the Supreme Court of the State of Michigan and the Recorder's Court for the City of Detroit, Michigan.

PETITIONER'S REPLY BRIEF.

DAVID W. LOUISELL,
Washington, D. C.,
Counsel for Petitioner.

WILLIAM G. FITZPATRICK,
Detroit, Michigan.

SPENCER & LOUISELL,
Washington, D. C.,
Of Counsel.

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PETITIONER'S REPLY BRIEF.

In Reply to Respondent's Point One.

Respondent contends that the petitions for certiorari herein come too late, arguing that the three-months' period in which to apply for certiorari commenced to run from January 13, 1948, the date the Michigan Supreme Court entered its order denying application for leave to appeal (R. 124), rather than February 17, 1948, the date that court

entered its order denying petitioner's motion for reconsideration (R. 129-130). Hence, so the argument runs, the order of a Justice of this Court dated May 10, 1948, extending until June 17, 1948, the time for petitioning for certiorari (R. 131), is ineffective (Respondent's Opposing Brief, pp. 8-13). Brief consideration of the precise action of the Michigan Supreme Court, and of controlling authorities of this Court, will show respondent's contention wholly groundless.[1]

Respondent's contention assumes that the Michigan Supreme Court did not entertain petitioner's motion for reconsideration or decide it on the merits, and respondent refers only to the Michigan Supreme Court's docket entry of denial of such motion (R. 123; Respondent's Opposing Brief, p. 3). But the order denying such motion is in the record and on its face shows that the court entertained and decided the motion. We quote such order *verbatim:*

"IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER DENYING MOTION FOR RECONSIDERATION—FILED FEBRUARY 17, 1948

In this cause a motion is filed by defendant for a reconsideration of the order heretofore entered herein on January 13, 1948, denying defendant's application for leave to appeal from the sentence of the Recorder's Court of the City of Detroit, and a brief in opposition thereto having been filed by plaintiff, and due consid-

[1] Candor compels us to state that this contention is sheer afterthought. When petitioner's motion for reconsideration was before the Michigan Supreme Court, the People submitted a detailed brief arguing the merits of such motion, but saying not one word against the jurisdiction of the Michigan Supreme Court to entertain the motion. Motions for reconsideration, such as that of petitioner herein decided February 17, 1948, are well recognized in Michigan practice, frequently being made, entertained and decided on the merits following denial of application for leave to appeal in criminal cases. Such motions are not reported.

eration thereof having been had by the Court, It is ordered that the order heretofore entered herein on January 13, 1948, as aforesaid, be and the same is hereby affirmed." (R. 129-130.)

From the face of the above order it conclusively appears that the Michigan Supreme Court entertained and considered petitioner's motion for reconsideration and on February 17, 1948, decided such motion on the merits. It will be noted that such order even recites that the People filed a brief in opposition to the motion. That brief, which argued in detail the merits of such motion, did not so much as suggest or hint at an argument against the jurisdiction of the Michigan Supreme Court to entertain the motion. It will also be noted that said order of February 17, 1948, "hereby affirmed" the order of January 13, 1948. Under these circumstances it is conclusively settled that the time in which to apply for certiorari commenced to run from February 17, 1948.

Texas Pac. Ry. Co. v. *Murphy*, 111 U. S. 488.
Chicago Great Western R. Co. v. *Basham*, 249 U. S. 164.
Citizens' Bank of Michigan City, Ind. v. *Opperman*, 249 U. S. 448.

See also:

Brockett v. *Brockett*, 43 U. S. 238.
Aspen Mining & Smelting Co. v. *Billings*, 150 U. S. 31.

In *Texas Pac. Ry. Co.* v. *Murphy, supra*, the Texas Supreme Court's judgment of affirmance was entered May 29, 1883, and its order denying a motion for rehearing was entered December 21, 1883. Such order was substantially identical with the Michigan Supreme Court's order here involved. This Court held that the time in which to sue out a writ of error ran from December 21, 1883, and not May 29, 1883, because, although the record did not show when

the motion for rehearing had been made, such motion was *entertained* by the Texas Supreme Court and *decided on its merits.* This Court said:

> "In *Brockett* v. *Brockett,* 2 How. 238, it was decided that a petition for rehearing, presented in due season and entertained by the court, prevented the original judgment from taking effect as a final judgment, for the purposes of an appeal or writ of error, until the petition was disposed of. This record does not show in express terms when the motion for a rehearing was made, but it was entertained by the court and decided on its merits. The presumption is, therefore, in the absence of anything to the contrary, that it was filed in time to give the court control of the judgment which had been entered, and jurisdiction to enforce any order that might be made. This presumption has not been overcome." (p. 489.)

In *Chicago Great Western R. Co.* v. *Basham, supra,* this Court said:

> "Section 237, Judicial Code, both before and since the amendment of September 6, 1916, permits of the review by this court only of the final judgment or decree of the highest state court in which a decision in the suit could be had. It is only a judgment marking the conclusion of the course of litigation in the courts of the state that is subjected to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the state court of last resort through the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that court, we must take it that by the practice prevailing in the state the litigation is not brought to a conclusion until this petition is disposed of, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the act of Congress." (pp. 166-167.)

In *Citizens' Bank of Michigan City, Ind.* v. *Opperman, supra,* this Court said:

> "* * * Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months' limitation begins to run from date of such denial or other disposition." (p. 450.)

The Michigan Supreme Court having entertained, considered and decided on the merits petitioner's motion for reconsideration, as conclusively appears from its order of February 17, 1948, the matter is ended for this Court, whose functions do not include a critique of the rationale of state practice and procedure. However, it may be noted, *passim*, that clear authority for the Michigan Supreme Court's entertainment of the motion for reconsideration and decision thereof on the merits, appears in its Rule 72, "Miscellaneous Relief Obtainable In Supreme Court",[2] Section 1, subparagraph (g), which provides that such court may, at any time, in its discretion and on such terms as it deems just, "Give any judgment and make an order which ought to have been given or made, and make such other and further orders and grant such relief, whether mentioned in the notice of appeal or not, as the case may require;" (Michigan Court Rules, Rule 72, Section 1 (g)).[3]

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[2] The Michigan Supreme Court by constitutional provision and statute has clear authority to prescribe its rules. Michigan Constitution, 1908, Art. VII, Section 5; Mich. Stat. Ann., Secs. 27.34, 27.44, 27.111.

[3] Respondent correctly states that petitioner's motion for reconsideration does not fall within Rule 71, Section 4, of the Michigan Court Rules. This is true beyond question; Section 4 on its face applies only to applications for rehearing after the Michigan Supreme Court has heard an appeal, decided the case, and filed its opinion (see Respondent's Opposing Brief, p. 11). Here, leave to appeal was denied and no opinion ever filed (R. 124), and clearly said Section 4, with its requirement that applications for rehearing be filed within twenty days from the filing of the opinion, is wholly inapplicable. This need not be labored; respondent expressly concedes such inapplicability (Respondent's Opposing Brief, p. 12).

In Reply to Respondent's Points Two and Three.

We respectfully submit that the generalities advanced in Respondent's Opposing Brief—not every error committed by a trial court is a denial of due process (p. 14); the trial judge has wide discretion in the conduct of a criminal trial (pp. 16, 20); credibility of expert witnesses is for the jury (p. 22)—do not answer the showing, documented in the petitions herein, of essential unfairness. Nor does respondent's choice not "to enter into a lengthy discussion or analysis of the facts, for these, after all, were for the jury" (p. 7) nor its disinclination to consider because "too trivial" the grave contamination inherent in the "nylon stocking episode" (p. 22), avail to dissuade from scrupulous review of the documented claims of denial of constitutional right, for where such denial is asserted, this Court will of its own responsibility appraise and analyze the facts.

Norris v. *Alabama*, 294 U. S. 587, 590.
Chambers v. *Florida*, 309 U. S. 227, 229.
Smith v. *Texas*, 311 U. S. 128, 130.

Even if it be true, as stated in Respondent's Opposing Brief, p. 24, that "the trial court in its proceedings was guided solely by well-established Michigan law, both statutory and judicially declared", this will not avail respondent against the showing in this case of violation of the Fourteenth Amendment. The Michigan courts should also have been guided by the federal constitutional guarantee of essential fairness in judicial proceedings.

Conclusion.

The contention that the petitions for certiorari herein were filed too late is groundless. It is respectfully submitted that such petitions should be granted, that the serious constitutional violations presented in them may be conclusively shown to this Court.

Respectfully submitted,

DAVID W. LOUISELL,
Washington, D. C.,
Counsel for Petitioner.

WILLIAM G. FITZPATRICK,
Detroit, Michigan.

SPENCER & LOUISELL,
Washington, D. C.,
Of Counsel.